No. 89-797

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DON PIERCE, *et al.*,

Petitioners,

v.

COMMERCIAL WAREHOUSE, *et al.*,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Eleventh Circuit

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OPPOSITION BRIEF OF RESPONDENTS FEL-PRO INCORPORATED, FEDERAL-MOGUL CORPORATION, COOPER INDUSTRIES, INC., THE GATES RUBBER CO., ARROW AUTOMOTIVE INDUSTRIES, ALLIED CORPORATION, AND SEALED POWER CORPORATION

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Question Presented

Did the courts below err in concluding that there was no triable issue in this case where the parties cross-moved for summary judgment on a dispositive threshold issue (whether jobber-petitioners are "purchasers" from manufacturer-respondents under the Robinson-Patman Act) as to which there was no dispute as to any material fact?

Interested Parties

Pursuant to Supreme Court Rule 34(b), a list of the parties to the proceeding in the court whose judgment is sought to be reviewed is contained in the caption and on the inside cover of the Petition for A Writ of Certiorari.

The listing of the instant respondents' parents, subsidiaries and affiliates, required by Supreme Court Rule 28.1, is contained in the Petition at pages iii-vi; the following amendments should be made to the listing:

II. Fel-Pro Incorporated

Fel-Pro Incorporated is a wholly-owned subsidiary of Felt Products Mfg. Co. Fel-Pro of Canada Limited, Phillips Gasket, Inc., and Berrick Industries, Inc. are other wholly-owned subsidiaries of Felt Products Mfg. Co. Fel-Pro Realty Corporation and Unity Sales Corp. are affiliates. Power Components, Ltd. (Great Britain) is a wholly-owned subsidiary of Felt Products. All of these companies are privately owned.

IV. Allied Corporation

Allied Corporation has been merged into Allied-Signal, Inc. Allied-Signal, Inc. has a number of foreign subsidiaries, as well as the following active domestic subsidiaries, affiliates and partnerships:

Airsupply International
Allied Chemical International Corp.
Allied Chemical Nuclear Products, Inc.
Allied Signal Europe
Allied-General Nuclear Services
Allied-Signal International Finance Corporation
Allied-Signal China, Inc.

Allied-Signal International Inc.
Allied-Signal Aerospace Service Corp.
Bayfield Corporation
Bendix - Jidosha Kiki Corporation
Bendix Field Engineering Corp.
Bendix Oceanics, Inc.
Bendix Transportation Management Corporation
Cataleasco, Inc.
EM Sector Holdings Inc.
Endevco Corporation
Garrett Airline Repair Company, Inc.
Garrett Comtronics Licensing Corp.
Garrett Comtronics Corporation
Grampian Properties, Ltd.
International Turbine Engine Corp.
King Radio Corporation
Leaseway All-Services, Inc.
Norplexoak Inc.
Oak Mitsui Inc.
Parfield, Inc.
Realdix Corporation
Remtex Manufacturing, Inc. - U.S.
Transducer Technology, Inc.
Universal Oil Products Company Ltd.
UOP Asia Ltd.
UOP Equitec Services, Inc.
UOP Inter-Americana, Inc.
UOP Management Services, Inc.
UOP Processes International Inc.

The only asset of Allied Chemical Nuclear Products, Inc. is a 50% general partnership interest in Allied-General Nuclear Serv. Partnership. Oak Mitsui Inc. is 50.1% owned.

VII. Sealed Power Corpoation

Sealed Power Corporation is a wholly-owned subsidiary of SPX Corporation.

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Respondents Fel-Pro Incorporated, Federal-Mogul Corporation, Cooper Industries, Inc., The Gates Rubber Co., Arrow Automotive Industries, Inc., Allied Corporation, and Sealed Power Corporation (collectively referred to as "the manufacturers") respectfully oppose the Petition for Writ of Certiorari ("Pet.") filed by the plaintiffs below (collectively referred to as "the jobbers"). The jobbers seek review of a decision of the United States Court of Appeals

for the Eleventh Circuit, which affirmed *per curiam* the summary judgment granted by the United States District Court for the Middle District of Florida in favor of the manufacturers and other defendants. Both the district court and the court of appeals concluded that the jobbers had not made out a viable claim under Section 2(a) of the Robinson-Patman Act, because the undisputed facts were legally insufficient to meet the requirements of the indirect purchaser doctrine.

STATUTE INVOLVED

This case involves Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), which provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . .

STATEMENT OF THE CASE

The operative facts of this case are undisputed. The jobbers' characterization of the record, however, is incomplete in many respects. Therefore, the manufacturers submit this counterstatement of the case.

1. Introduction

The jobbers amended their complaint twice in this case, discarding a Sherman Act conspiracy theory that they originally pled, and ultimately settling on the price discrimination theory that was found to be inadequate by the courts below.

The case turned on a single issue, as framed by the parties on cross-motions for summary judgment after full discovery—whether the jobbers were "purchasers" from the manufacturers under the Robinson-Patman Act. All four judges who considered the case concluded that there is no genuine issue of material fact, and that the jobbers are not "purchasers"—direct or indirect—from the manufacturers. The Court of Appeals for the Eleventh Circuit concluded that the jobbers "[brought] forth nothing to show that the manufacturers' failure to sustain the typical line of distribution violates federal law." 876 F.2d at 88 n.3; Appendix ("App.") A-7 n.5.[1]

2. The Parties

The jobbers (plaintiffs below) are auto parts stores in Tampa, Florida which sell parts to garages, repair shops, individuals, and others. R11-198, Tab "Boyle" 49-50. They call themselves "jobbers." *Id.*, Tabs "Vega" 24, 212; "Pellage" 23; "Boyle" 37; "Daniels" 102. They sell relatively small quantities of automotive product lines made by dozens of different manufacturers. R11-198, Tab 2. A single manufacturer may offer hundreds and even thousands of different parts for the maintenance of the many vehicles operating in this country. The manufacturer-respondents' products constitute a small fraction of the jobbers' inventory.

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[1] The "Appendix" citations are to the Appendix to the Petition for Writ of Certiorari, wherein the opinions of the court of appeals and the district court are reproduced. The record citations (designated "R.") are to the record in the court of appeals. We have followed the citation format adopted by petitioners. For example, R4-9-6 indicates: R (record reference), 4 (volume number), 9 (document number) and 6 (page number).

The seven manufacturers (defendants below) produce and/or distribute different kinds of auto parts: Fel-Pro supplies gaskets; Federal-Mogul supplies bearings and seals; Arrow supplies rebuilt clutch, engine, and other components; Gates supplies rubber products; Allied and Cooper both supply brake parts; and Sealed Power supplies engine rings. Each of the manufacturer-respondents has chosen to sell its products in the Tampa area only to several warehouse distributors ("WDs"). None of the manufacturers sells its products to any jobber in the Tampa area, including the jobber-petitioners.

The WD-respondents (defendants below) are five of the fourteen independent WDs in the Tampa area from whom the jobbers buy automotive parts. The WD-respondents maintain a greater breadth of product line and higher inventory levels than jobbers. 691 F. Supp. at 298; App. D-19. None of the manufacturer-respondents owns or operates any of the WD-respondents. R11-198, Tab 9; R11-199-4-5, 13-14, 19-20, 25, 30-31, 38. Nor are those warehouse distributors authorized agents for any manufacturer-respondent. R11-200-2, 7-8, 15, 20, 25. Those independent businesses are arms-length customers of the manufacturer-respondents. R11-199-3, 13-14, 19-20, 25, 30-31, 38-39; R11-200-1, 6-7, 14, 20, 24-25.

Throughout their petition, the jobbers imply that certain facts are broadly representative with respect to the separate manufacturers. The seven manufacturer-respondents in reality make different products and have different arrangements with and terms of sale to the WDs to whom they choose to sell, among other differences.

3. The District Court Proceedings

The jobbers' original complaint alleged that the seven manufacturers and five WDs had violated their "constitutional rights to earn a livelihood" as "jobbers" by engaging in "price fixing, exchange of price information, tying, exclusive dealing, and boycott agreements" prohibited by the Sherman Act. R1-1-6, 10. That original complaint alleged no Robinson-Patman Act price discrimination claims. Confronted with a motion to dismiss (R2-63), the jobbers voluntarily dismissed that complaint and filed a second one alleging price discrimination under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). R2-70-8-9. Although they no longer alleged any joint liability or concerted activities, they continued to name the seven unrelated manufacturers and five warehouse distributors as defendants. The manufacturers moved to dismiss that complaint for failure to state a claim and lack of standing. R2-88. The jobbers then filed their third complaint, again alleging Robinson-Patman Act violations. R4-123.

Following a stipulation of the parties, the district court established a schedule for further discovery (R6-172), which commenced immediately. At a status conference, the manufacturers advised the district court and the jobbers that they would be filing motions for summary judgment, based on the fact that none of the manufacturers had ever sold any products to any of the jobbers and therefore could not have engaged in price discrimination against them within the meaning of the Robinson-Patman Act. R6-192-6-7. Contrary to the impression the jobbers attempt to create in their Petition (Pet. at 15), it was at the *joint* request of all the parties that the district court entered an

agreed schedule for completing discovery on that threshold issue, specifically enabling the jobbers to complete all twelve of the depositions that they sought. R6-193. The jobbers deposed each defendant, and the defendants deposed each plaintiff. Both sides exchanged thousands of pages of documents, and answered interrogatories and requests for admissions.

The manufacturers moved for summary judgment on the ground that the jobbers were not "purchasers" from them under Section 2(a) of the Robinson-Patman Act. R6-194. Significantly—and contrary to the jobbers' present assertion that summary judgment is not appropriate in cases such as this one (Pet. at 31-41)—the jobbers cross-moved for summary judgment on the same legal issue, agreeing "that there is no genuine dispute of material fact" on the issue of Robinson-Patman Act liability. R6-201-1. After full briefing of these cross-motions (R6-202, 205; R7-209, 215, 216, 222, 223), the district court received supplemental submissions from the jobbers. R7-230, R8-236, 238, 245.

4. The District Court Decision

The district court granted the manufacturers' and WDs' summary judgment motions, and denied the jobbers' cross motion. The court first noted the unquestioned rule that a "sale to one and a *refusal to sell* to another will not be deemed 'sales' to two or more purchasers at discriminatory prices." 691 F. Supp. at 296; App. D-10 (emphasis added). As the jobbers conceded that they had not purchased any products directly from the manufacturers, the district court went on to consider the "indirect purchaser" doctrine. The thrust of that well-established, but narrow, doctrine is "that a manufacturer, by utilizing the subterfuge

of a 'dummy' wholesaler or distributor, should not be able to evade the price discrimination provisions of the Robinson-Patman Act." 691 F. Supp. at 296; App. D-11, *citing Hiram Walker, Inc. v. A&S Tropical, Inc.*, 407 F.2d 4 (5th Cir. 1969), *cert. denied*, 396 U.S. 901 (1969).

The district court carefully reviewed and applied the standards of both the *Hiram Walker* case and *Purolator Products, Inc. v. FTC*, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968)—the case now cited by the jobbers to fashion a nonexistent conflict between the circuits. It specifically analyzed *Purolator*'s recitation of the indicia of impermissible evasions of the statute, which included direct negotiation of changes in price between Purolator and the indirect purchasers, direct negotiation of franchise agreements between Purolator and the indirect purchasers, and Purolator's direct solicitations of the indirect purchasers and urging that they maintain prices. 691 F. Supp. at 297; App. D-13-14.

The district court then applied the *Hiram Walker* and *Purolator* standard to the undisputed facts of this case. In addition to noting the overwhelming evidence that the manufacturers play no role in the WDs' resales to the jobbers, the district court directly confronted the isolated and minimal contacts on the basis of which the jobbers attempted to invoke the indirect purchaser doctrine: the existence of manufacturers' suggested resale prices, a few promotional visits by some of the manufacturers' field representatives upon some of the jobbers, and old supply agreements between some—but not all—manufacturers and some WDs (but *not* with any jobber-petitioner). 691 F. Supp. at 298-301; App. D-17-38. These facts were "viewed

in the light most favorable to the nonmoving party" (*id.* at 296, App. D-7), but under the applicable case law and summary judgment principles, these minimal contacts were not sufficient to raise a genuine issue that any of the jobbers were "indirect purchasers" from the manufacturers. *See id.* at 302; App. D-37.

Because of the parties' joint stipulation to submit only the threshold "purchaser" issue (*see* 691 F. Supp. at 295, App. D-5), the district court did not consider other deficiencies in the jobbers' case, such as their concession that competition has been increased by the practices of which they complain. R-11-198, Tab. 18. The district court correctly found that these jobbers simply could not meet even the threshold statutory "purchaser" requirement:

> There is uncontroverted evidence that the Manufacturer Defendants do not control the price, terms or manner of the W/D's sales, nor do the Manufacturers own the Warehouse Distributors. There is no "dummy" entity or spurious intermediary involved in the subject transactions.

691 F. Supp. at 302; App. D-37. Accordingly, applying the Fifth (and Eleventh) Circuits' *Hiram Walker* and the Seventh Circuit's *Purolator* precedents, the district court granted summary judgment to the manufacturers and WDs and denied the jobbers' cross-motion for summary judgment.[2]

5. The Eleventh Circuit Decision

On the jobbers' appeal, the Court of Appeals for the Eleventh Circuit affirmed the district court *per*

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[2] The jobbers responded with an intemperate motion for reconsideration, which the district court denied. R8-252.

curiam, concluding that: "[Jobbers] failed to produce evidence to establish that any genuine issue of material fact remains to be resolved," and that the jobbers had "[brought] forth nothing to show that the manufacturers' failure to sustain the typical line of distribution violates federal law." 876 F.2d at 88 and n.3; App. A-7 and n.5.

The court noted that the jobbers "do not contend that the manufacturers sold directly to them. Rather, they invoke the indirect purchaser doctrine of Robinson-Patman Act jurisprudence that recognizes an antitrust violation when a manufacturer sells indirectly to a jobber through a compliant intervening distributor at a discriminatory price." 876 F.2d at 87; App. A-5.

The appellate court squarely rejected the jobbers' contention that the manufacturers "controlled" the terms and conditions of the WDs' resales to jobbers so as to make the jobbers indirect purchasers of the manufacturers. Regarding the jobbers' allegations of manufacturer control over prices, the court noted that although the manufacturers issue sheets suggesting resale prices to the WDs, "the record does not support [jobbers'] allegation that the WDs are compelled to adhere to the sheets or uniformly follow them." 876 F.2d at 88; App. A-8. The court referred to the overwhelming record evidence, including the WDs' uncontroverted testimony that they alone set the prices at which they resell the parts and that such prices may be higher, lower, or the same as suggested by the manufacturer. *Id.* Furthermore, on deposition, the jobbers admitted that they can and do buy parts in volume from the WDs at prices discounted from the suggested prices. *Id.*

The court examined the sales "agreements" that some, but not all, of the manufacturers have had with some WDs, including the specific provisions that the jobbers claim evidence manufacturer "control" or the "ability to control." It concluded that the "agreements" do not provide manufacturers with any rights to control the terms and conditions of WDs' sales to jobbers. 876 F.2d at 88; App. A-9. The court observed that none of the contracts are enforced and that WDs suffer no retribution if a sales contract is not signed. *Id.* at 88; App. A-8-9.

Finally, relying upon *Hiram Walker*, the court found that the general promotional activities of manufacturers' field representatives ("missionary men") with jobbers do not establish that the manufacturers control the resale of their products by the WDs. *Id.* at 88; App. A-9-10. The jobbers evidently do not question this aspect of the decision below.

The appellate court concluded:

> The record does not indicate that the resales of manufacturers' parts from the WDs to the jobbers were sham sales that in truth and fact were controlled by the manufacturers. The indirect purchaser doctrine is inapplicable; appellants have not made out a viable Section 2(a) claim against the manufacturers.

Id. at 88; App. A-10.

The Eleventh Circuit denied the jobbers' petition for rehearing. App. C.

REASONS THE WRIT SHOULD BE DENIED

SUMMARY OF ARGUMENT

This case represents the jobbers' effort to have the courts insulate them from competition and preserve their role in the distribution chain—regardless of market forces. The jobbers' position is fundamentally at odds with the policies behind, and the overwhelming body of case law interpreting, the antitrust laws. Because the law is so clear, the jobbers have been forced to ignore undisputed facts, to concoct novel and unsupported legal theories, to manufacture an artificial "conflict" between circuits where none exists, and to invent similarities between this case and *Hasbrouck v. Texaco* (pending before this Court), which involves completely different facts and legal issues.

A fundamental, threshold requirement of the Robinson-Patman Act is proof that the defendant made two sales to two different purchasers at two different prices. The jobbers could not meet that statutory requirement because it is undisputed that none of them bought products from any manufacturer.

The "indirect purchaser" doctrine is inapplicable here. The courts have long and uniformly held that the indirect purchaser doctrine is limited to those rare situations where the seller is selling through a sham intermediary whose resale prices and terms it controls in order to get around the Robinson-Patman Act. The jobbers' suggestions that the two lower court decisions in this case are departures from indirect purchaser jurisprudence and that there is a conflict in the circuits in interpreting the doctrine are simply wrong. There is no circuit conflict; indeed, this body of case law is remarkably consistent and the decisions

below are in complete harmony with that case law, including *Purolator*.

This case presents no issues worthy of certiorari. The jobbers try to manufacture such an issue in order to ride the coattails of *Hasbrouck v. Texaco*, but that case is entirely different from this one. The plaintiffs in *Hasbrouck* met the threshold "purchaser" requirement of the Robinson-Patman Act and went on to raise other issues which this Court is now considering, *i.e.* the legality of functional discounts where a producer sells to wholesalers at one price and to retailers at a higher price. In this case, in contrast, the jobbers could not even meet the threshold statutory requirement of demonstrating that they are "purchasers."

Summary judgment in this case is entirely consistent with principles established by this Court, as well as with the large number of courts that have granted summary judgments to defendants in indirect purchaser cases under circumstances similar to those here. Significantly, the jobbers themselves cross-moved for summary judgment, agreeing "that there is no genuine dispute of material fact" on the issue of Robinson-Patman liability. The jobbers' real quarrel is not that summary judgment was granted in this case, but that it was not granted to *them*. Their position has already been rejected by four judges. The jobbers now ask a third Court to review once again the undisputed facts in this case. That request should be denied.

ARGUMENT

I. *Hasbrouck v. Texaco* Involves Facts And Legal Issues Significantly Different From This Case

The jobbers have distorted the issues, the district court decision below, and the uncontroverted facts to

try to hammer the square peg of this case into the round hole of *Hasbrouck v. Texaco*, 842 F.2d 1034 (9th Cir.), *cert. granted*, ___ U.S. ___ , 109 S. Ct. 3154 (1989). It simply will not fit.

A fundamental requirement of the Robinson-Patman Act is proof of two sales to two different purchasers at two different prices. 15 U.S.C. § 13(a) (1982); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960); *Hiram Walker*, 407 F.2d at 7. That threshold requirement is the only issue in this case. Since it is undisputed that the jobbers do not purchase products from the manufacturers, the only way for the jobbers to satisfy this threshold requirement is to claim "indirect purchaser" status, a status which has been rejected by the two courts below.

In *Hasbrouck*, the threshold "purchaser" requirement was met because Texaco admittedly sold gasoline *directly* to plaintiff-retailers at one price and to two wholesalers at another lower price. 842 F.2d at 1037. The central issue in *Hasbrouck* is whether the "functional discount" Texaco afforded to the wholesalers, but not to the retailers, is lawful. In contrast, in this case neither the issue of functional discounts[3]

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[3] The jobbers misleadingly seize on the district court's reference to a "functional discount" (Pet. at 22-23, citing App. D-32-33) to try to bring this case within the *Hasbrouck* ambit. Although the prices the manufacturers charge the WDs are less than the WDs' suggested *resale* price, and can be (and are, by some manufacturers) calculated as a percentage mark-down from the suggested resale price (R11-199-6, 15, 21, 26, 31-32, 39), those prices charged to WDs are not a "discount" in the sense of two different prices for two different transactions, because the manufacturer-respondents do not sell to the jobbers at a different price. R-Exhibits-220, Tab

nor any defenses (such as cost justification) was ever reached because the jobbers failed to show that the manufacturers made two sales to two different purchasers at two different prices.

In short, this case, unlike *Hasbrouck*, does not in any way involve two different prices ("discounts") in two different sales. *Hasbrouck* and this case involve different facts and legal issues; this case is not dependent upon the outcome of *Hasbrouck*. The jobbers' attempt to ride *Hasbrouck*'s coattails is unavailing.

II. There Is No Conflict In The Circuits Regarding Indirect Purchaser Doctrine Standards

A. The District Court And The Eleventh Circuit Decisions And The Standards Applied Are Consistent With Indirect Purchaser Jurisprudence

There is no conflict in the circuits in the application of the indirect purchaser doctrine. Indeed, the indirect purchaser case law is remarkably consistent, in both the standards applied and the outcomes based on facts similar to those here. The lower courts' decisions in the instant case and the standards that were applied are fully consistent with that well-established body of law. The jobbers' suggestion that the lower courts here did something extraordinary or unprecedented is simply wrong.

"The thrust of this so-called 'indirect purchaser' doctrine is that a manufacturer, by utilizing the subterfuge of a 'dummy' wholesaler or distributor, should not be able to evade the price discrimination provisions of the Robinson-Patman Act." *Hiram Walker, Inc.*, 407 F.2d at 7-8, *citing American News Co. v.*

"Egan" 21-22. It is undisputed that there is only *one* price, regardless of how it is calculated.

FTC, 300 F.2d 104, 109-110 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962). *See Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 84 (6th Cir. 1981); *Schwimmer v. Sony Corp. of America*, 637 F.2d 41, 48-49 (2d Cir. 1980). To invoke it, a plaintiff has to demonstrate that a manufacturer "*deals directly* with the retailer and *controls the terms* upon which he buys" from the dummy intermediary. *American News Co. v. FTC*, 300 F.2d at 109 (emphasis added).

The indirect purchaser doctrine was created in 1937 by the Federal Trade Commission in *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937). Designed to prevent evasion of the statute, the doctrine is narrow, and the standards for meeting it are rigorous. At least a dozen courts other than those in this case have granted summary judgments against the party who relied on the indirect purchaser doctrine.[4] Indeed,

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[4] *See Hiram Walker, Inc.*, 407 F.2d 4 (5th Cir. 1969); *Kenwood Lincoln-Mercury v. Ford Motor Co.*, 1986-2 Trade Cas. (CCH) ¶ 67,221 (S.D. Ohio 1986); *Adams v. Maher Oil Co.*, No. 86-2373 (D. Kan. Apr. 4, 1988) (LEXIS, Genfed library, Dist file); *Skinner v. U.S. Steel Corp.*, 233 F.2d 762 (5th Cir. 1956); *Windy City Circulating Co. v. Charles Levy Circulating Co.*, 550 F. Supp. 960 (N.D. Ill. 1982); *Wales Home Remodeling Co. v. Alside Aluminum Corp.*, 443 F. Supp. 908 (E.D. Wis. 1978); *Giguere's Supermarkets, Inc. v. Hannaford Bros. Co.*, 1983-1 Trade Cas. (CCH) ¶ 65,243 (D. Mass. 1983); *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956); *H.A.B. Chemical Co. v. Eastman Kodak Co.*, 1981-1 Trade Cas. (CCH) ¶ 63,912 (C.D. Cal. 1980); *Blatt v. Lorenz-Schneider Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,670 (S.D.N.Y. 1980); *Island Tobacco Co. v. R.J. Reynolds Indus., Inc.*, 513 F. Supp. 726 (D. Haw. 1981); *Bay City-Abrahams Bros., Inc. v. Estee Lauder, Inc.*, 375 F. Supp. 1206 (S.D.N.Y. 1974)—all entering summary judgment and rejecting indirect purchaser claims. *See also Krause v. General Motors Corp.*, 1988 Trade Cas. (CCH) ¶ 68,163 at 59,090 (E.D. Mich. 1988) (granting defendant's motion to dismiss an indirect purchaser claim).

the published decisions reveal no instance in which a private plaintiff has *ever* prevailed in a judgment based on this doctrine.

In the rare cases where the FTC prevailed in court under this doctrine, the manufacturer itself directly negotiated price changes with the indirect purchaser, directly negotiated franchise agreements with the indirect purchaser, wrote or approved distributor agreements between its wholesaler-customers and the indirect purchaser, and/or fixed or enforced resale prices. *See American News Co. v. FTC*, 300 F.2d at 107; *Purolator Products, Inc. v. FTC*, 352 F.2d at 881, 884; *Monroe Auto Equip. v. FTC*, 347 F.2d 401, 402 (7th Cir. 1965), *cert. denied*, 382 U.S. 1009 (1966). *See also Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 888 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969) (distinguishing FTC cases on some of these facts). The FTC has not brought an indirect purchaser case since the 1960's.[5]

The jobbers allege that one case, *Purolator Products v. FTC*, conflicts with the lower court decisions in this case. As discussed below, such a conflict is

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[5] The Petition conveys the erroneous impression that *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 353 (1968), is an indirect purchaser case. Pet. at 29. *Fred Meyer* involved seller discrimination among direct purchasers from the defendants. This Court expressly noted that it was "unnecessary" to "resort to the indirect customer doctrine" in a case like that one, where discrimination among direct purchasers adversely affected downstream competitors. 390 U.S. at 354.

Moreover, *Fred Meyer*, which involved preferential promotional payments, is limited to cases under Robinson-Patman Act § 2(d). *See FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1026 n.8 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

nonexistent; the standards applied in *Purolator* and the standards applied by the courts below are consistent.

The jobbers relied upon three alleged indicia of manufacturer "control" to invoke the indirect purchaser doctrine: existence of manufacturers' suggested resale prices, provisions of unenforced old supply agreements between some manufacturers and some WDs, and occasional visits by some manufacturers' field representatives upon some jobbers. Both the district court and the Eleventh Circuit examined all of these indicia and found them insufficient. The jobbers now ask this Court to reexamine the lower courts' findings regarding suggested prices and the agreements; they evidently do not question the lower courts' decisions regarding promotional visits. The jobbers have presented no reason why this Court should depart from its long-standing practice of not disturbing factual findings concurred in by two lower courts. *See Rogers v. Lodge*, 458 U.S. 613, 623 (1982), and cases cited therein.

1. Manufacturer Suggested Prices Are Not Sufficient To Invoke The Indirect Purchaser Doctrine

The existence of manufacturer suggested prices is insufficient to raise a genuine issue of manufacturer "control" over the WDs' pricing in their sales to jobbers, as both lower courts found. The jobbers contend only that the price sheets raise "an economically plausible inference" of manufacturer control—"[o]n the surface, at least." Pet. at 31. That timid contention is not sufficient to forestall summary judgment based on the uncontroverted facts developed here after extensive discovery.

The district court noted the evidence that the manufacturers provide suggested prices only as a time-saving convenience to their customers in pricing the hundreds or thousands of parts that each WD sells. 691 F. Supp. at 300; App. D-26. The court carefully examined the record regarding use of the price sheets, and concluded that the jobbers did not bring forth *any* evidence that the WDs are in any way coerced into using the price sheets. *Id.* at 300; App. D-28. The WD-respondents filed affidavits and gave depositions attesting to their freedom to set their own resale prices. They testified that some products are priced higher than the suggested resale prices, and some are priced lower. *Id.* at 300; App. D-27. Indeed, the jobbers admitted that the WDs could set prices at any level they want and that there is no punishment for not using the price sheets. *Id.* at 301; App. D-31. There was no evidence that any manufacturer refused to retain any WD as a customer when the WD did not use the price sheets, or coerced the WDs in any way. *Id.* at 300-301; App. D-28-31.

The Eleventh Circuit agreed that the record does not support the jobbers' allegation that the WDs are compelled to adhere to the sheets or uniformly follow them. 876 F.2d at 88; App. A-8. The court noted the WDs' uncontroverted testimony that they set the prices at which they resell the parts, *as corroborated by the jobbers themselves*, who admitted that they buy parts in volume from WDs at prices discounted from the suggested prices. *Id.*

The lower courts were on sound legal grounds, and the jobbers are grasping at straws in their contention that the mere use of suggested price lists—a common practice in many industries—is sufficient to invoke the

indirect purchaser doctrine. This contention has been uniformly rejected by the courts that have considered the issue.

For example, the Second Circuit affirmed the denial of a preliminary injunction sought by an "indirect purchaser," because a plaintiff's chance of "ultimate success is dim" on a price discrimination claim where a manufacturer suggests a retail price but the wholesaler independently determines the retail price it charges for resales. *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969), *aff'g*, 283 F. Supp. 876, 879 (S.D.N.Y. 1968). Similarly, in a case also involving manufacturer promotional visits and written distributor agreements, one court noted the existence of suggested resale price lists, but nonetheless entered summary judgment against a plaintiff's "indirect purchaser" claim. *Blatt v. Lorenz-Schneider Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,670 at 77,604 (S.D.N.Y. 1980) (manufacturer "suggested wholesale list price[s]," but wholesaler was "perfectly free to charge whatever it wishes").

The jobbers' reliance on *Purolator* to support their position is misplaced. In *Purolator*, in addition to other indicia of "control," the manufacturer "direct[ly] polic[ed]" the indirect-purchaser jobbers' resale prices, "solicited" the jobbers, "urged" them to maintain the "suggested" prices (which they did, for the most part) and directly negotiated changes in price with the indirect purchasers. 352 F.2d at 881, 884. In this case, in contrast, there is no evidence whatsoever that the manufacturers "policed" the jobbers' resale prices, or "urged" the jobbers to maintain the "suggested prices" or directly negotiated changes in price with them. The district court correctly noted

factors which distinguished this case from the control exercised by Purolator. 691 F. Supp. at 297, 301-02; App. D-13-14.[6]

It is also instructive to contrast the jobbers' assertion that manufacturers' suggested price lists constitute sufficient "control" to invoke the indirect purchaser doctrine with the "control" over price required in *American News Co. v. FTC*. In that case—one of only three in which the FTC prevailed under the indirect purchaser doctrine—the following indicia of control were present: "in every instance" the national publisher (manufacturer) controlled the prices and terms of sale throughout the distribution process "so that neither the . . . distributor nor the wholesaler ha[d] any power to set prices . . . to retailers of the magazines." 300 F.2d at 107. Furthermore, the retailer's negotiations for price adjustments were conducted with the publisher or with a national distributor on behalf of the publisher, rather than with the wholesaler. *Id.*

In sum, the existence of manufacturer-suggested price lists is legally insufficient to invoke the indirect

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[6] The most the jobbers can point to is a lame assertion that some manufacturers' field representatives on infrequent occasions visited jobbers and "delivered" suggested price sheets to the jobbers. Pet. at 8. Absent some evidence that each manufacturer-respondent negotiated with the jobbers directly about price, policed resale prices, "solicited" the jobbers and "urged" them to maintain prices, mere distribution of price lists to the jobbers has never been held sufficient to invoke the indirect purchaser doctrine. *See Purolator Products*, 352 F.2d at 880, 881, 884. Issuance of suggested prices, even in combination with manufacturer promotional visits, is insufficient to invoke the indirect purchaser doctrine. *See Blatt v. Lorenz-Schneider Co.*, 1980-81 Trade Cas. (CCH) ¶ 63,670 (S.D.N.Y. 1980.)

purchaser doctrine. To hold otherwise, as the jobbers urge, would place manufacturers in legal jeopardy every time they issued a suggested price list—an efficiency-enhancing practice that is common throughout the automotive parts industry and many other industries in this country. The indirect purchaser doctrine is not meant to chill manufacturers' exercise of this right.

2. Unenforced Supply "Agreements" Between Some Manufacturers And Some WDs Are Insufficient To Invoke The Indirect Purchaser Doctrine

The jobbers try to concoct an argument that alleged "contracts" between some manufacturers and some WDs (but not jobbers) raise genuine issues of fact precluding summary judgment. As with so much else in their Petition, the jobbers largely ignore the record and the decisions below.

Most importantly, contrary to the jobbers' contention, none of the "contracts" contains any terms even addressing resale prices. There is simply no evidence whatsoever that *any* of the contracts provide manufacturers with control over resale prices or other terms and conditions of WDs' sales to the jobbers, as both lower courts concluded after examining the provisions the jobbers contend confer or "could" confer such control. 876 F.2d at 88; App. A-8-9; 691 F. Supp. at 299; App. D-21-25.

The jobbers' contention that the district court found that the "contracts" between some manufacturers and some WDs were "facially sufficient" to prove manufacturer control of jobber prices (Pet. at 17) is wrong. There is no such "finding" anywhere in the district court's decision. Indeed, after reviewing the "con-

tracts," the district court did not find any provision with respect to "control of jobber prices."

The Eleventh Circuit agreed with the district court and concluded that the various "contracts" do not provide manufacturers with any rights to control the terms and conditions of WDs' sales to jobbers. 876 F.2d at 88; App. A 8-9. The jobbers now want a third Court to review those contract provisions in the hope that this Court will see something in them that two other courts missed. The jobbers have not brought forth any reason, however, for this Court to disturb the factual findings concurred in by two lower courts.

In addition to the fact that the contracts do not contain any terms addressing resale prices, it is undisputed that none of the contracts is enforced—a fact that the jobbers ignore. 876 F.2d at 88; App. A-8; 691 F. Supp. at 299; App. D-24. As the district court correctly noted: "This indicates to the Court that the M/D's do not control the behavior of the W/D's so as to satisfy the requirements of the 'indirect purchaser' doctrine." 691 F. Supp. at 299; App. D-24.

The facts of this case—involving unenforced supply agreements between some manufacturers and some of their WD customers—are in marked contrast to *Purolator*. The manufacturer in *Purolator* directly negotiated franchise agreements with the indirect purchaser-jobbers and "wrote and supplied" the WD-jobber agreements. 352 F.2d at 881, 884; 65 F.T.C. at 32, 36. In light of these and other critical distinctions between *Purolator* and the instant situation, the jobbers' contention that *Purolator* is "directly on point" (Pet. at 29) is wide of the mark to say the least.

B. Jobbers' "Ability To Control" Argument Is Unsupported By The Law And The Facts

The jobbers implicitly raise the issue of whether a manufacturer's undefined "ability to control" its customers alone is sufficient to render downstream buyers "indirect purchasers" under the Robinson-Patman Act despite the absence of any *actual* control. *See, e.g.*, Pet. at 5, 27, 30, 36, 39. The jobbers raised this issue on appeal, after arguing in the district court that the manufacturers exercised "actual control" over resale prices. R6-201-3, R6-202-10-11.

The jobbers' novel "ability to control" standard finds no support in the law. Indeed, it is refuted by the only case upon which they rely. In *Purolator*, the Seventh Circuit required actual control: "If the seller *controls the sale*, he is responsible for the discrimination in the sale price, if there is such discrimination." 352 F.2d at 883 (emphasis added). On stipulated facts very different from the facts in this case,[7] the FTC there had found that Purolator "*did exercise control* over the distributor-jobber relationship to such an extent that the jobbers effectively were [Purolator's] customers rather than the distributors' . . . " 65 F.T.C. 8, 36 (1964) (emphasis added). Because *Purolator* involved a narrow scope of judicial review for an administrative FTC decision, the court of appeals did not decide just how extensive the actual control must be. It did, however, suggest that on a clean

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[7] As discussed above, Purolator "solicited" the indirect purchasers (jobbers), "urged" them to maintain "suggested" prices (which they did for the most part), "wrote and supplied" the WD-jobber agreements, and directly negotiated franchise agreements and changes in price with the indirect purchasers. 352 F.2d at 881, 884; 65 F.T.C. at 32, 36.

slate it might have required even more control than did the FTC:

> [I]t is not necessary to pass upon the *degree* of seller control required to constitute a buyer once or more times removed a purchaser within the meaning of the Act; it is only necessary to conclude that the Commission's finding of control was reasonable in view of the evidence, even though a court might have interpreted the evidence otherwise.

352 F.2d at 884 (emphasis added). The jobbers' reliance on *Purolator* is misplaced; potential control had nothing to do with that decision.

Courts since *Purolator* consistently have applied the indirect purchaser doctrine as requiring actual control. For example, in *Hiram Walker*, the Fifth Circuit required proof that the manufacturer was "controlling the price or terms of resale." 407 F.2d at 8. Similarly, the Sixth Circuit held in *Barnosky Oils* that there must be "sales at terms *actually controlled* by the manufacturer." 665 F.2d at 84 (emphasis added). *See also Wales Home Remodeling Co. v. Alside Aluminum Corp.*, 443 F. Supp. 908, 912 (E.D. Wis. 1978) (granting summary judgment to defendant where there was no showing "that the intermediary is *in fact controlled* by the manufacturer") (emphasis added); *Windy City Circulating Co. v. Charles Levy Circulating Co.*, 550 F. Supp. 960, 966 (N.D. Ill. 1982) (summary judgment for defendant where plaintiffs failed to show that the national distributors "controlled the purchase price paid by plaintiffs"); *Kenwood Lincoln-Mercury*, 1986-2 Trade Cas. (CCH)

¶ 67,221 at 61,100, 61,102 (S.D. Ohio 1986) (granting summary judgment, finding that absent proof that a manufacturer "*can and does control*" resale prices, courts "hold as a matter of law that [a plaintiff] cannot avail itself of the 'indirect purchaser' doctrine") (emphasis added).

The requirement of actual control is entirely consistent with the policies of the Robinson-Patman Act and economic realities. Under the Act, if a seller is not, in fact, setting the terms and conditions of sales made by some intermediary to a purchaser, then it is not, in fact, engaging in any kind of price discrimination against the buyer. To impose Robinson-Patman Act liability upon manufacturers in situations where they possibly "could control" the terms of sale would conceivably extend the indirect purchaser doctrine to virtually every resale of goods. Almost any plaintiff could then claim that there is a "genuine issue" whether a seller potentially "could" control a customer's resales. This would all but remove the "purchaser" requirement from the statute, without advancing any rational Robinson-Patman Act policy.[8]

The jobbers now recognize that none of the manufacturers has actual control over the WDs' resales to jobbers. The jobbers abandoned their "actual control" contentions in favor of the novel "ability to

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[8] Inherent in the jobbers' position is their view that they have a "right" to continue in the distribution chain even if WDs can more efficiently fulfill their function. The Robinson-Patman Act provides no such legal entitlement or right. So long as a manufacturer sells at only one price to all its WD customers, it is irrelevant whether "the effect may be to limit the development of additional layers of intermediaries. . . . " such as jobbers. *FLM Collision Parts*, 543 F.2d at 1028.

control" argument before the Eleventh Circuit, after being confronted with (a) the undisputed record that revealed not a scintilla of evidence of actual control, and (b) their own admissions that they sued the manufacturers precisely because they have *not* "police[d]" the WDs or maintained "control over the prices being charged and the customers being sold to by the WDs." R11-198, Tabs "Pellage" 101, 306; "Boyle" 122-23, 172; "McCaffery" 364.[9]

The bottom line is that the jobbers have not pointed to *any* evidence that the manufacturers have the legal power to control the WDs' resale prices or terms by means of suggested price lists, contracts or otherwise. Whether the standard is actual control or "ability to control," the jobbers' proffered indicia of such control was carefully examined by four judges and found insufficient.

III. Summary Judgment For Defendants Was Appropriate In This Case

The jobbers' contention that summary judgment is inappropriate in this case can be disposed of easily.

The jobbers fail to mention that they themselves cross-moved for summary judgment on the same legal theory as the manufacturers, thereby acknowledging

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[9] The jobbers' claim that the manufacturers "could control" the WDs' sales to jobbers is all the more implausible in light of the economic realities of this industry. For some of the Tampa-area WDs, the manufacturer-respondents' products constitute a small fraction of the products of forty manufacturers that they carry. R11-200-8, 9-10. As the jobbers themselves recognize, where the direct purchasers (WDs) distribute products manufactured by multiple sellers "no one seller would dominate such a multi-product distributor." Pet at 30.

that this case was amenable to summary disposition on the question of whether they are "purchasers" from the manufacturers. "Necessarily, both sides, by making [cross-]motions, concede that there is no material question of fact but that the matter should be determined as a question of law." *Dell Publishing Co. v. Summerfield*, 198 F. Supp. 843, 844 (D.D.C. 1961), *aff'd*, 303 F.2d 766 (D.C. Cir. 1962). "When both parties proceed on the same legal theory and rely on the same material facts, the court is signaled that the case is ripe for summary judgment." *See, e.g., Shook v. United States*, 713 F.2d 662, 665 (11th Cir. 1983); *see also Joplin v. Bias*, 631 F.2d 1235, 1237 (5th Cir. 1980). The jobbers' real quarrel is not that this case was disposed of by summary judgment, but that summary judgment was granted to the manufacturers and WDs, and not to them.

In 1986, this Court decided three cases that reconsidered previous summary judgment practices that had flooded the courts with burdensome, and ultimately nonmeritorious, litigation; those decisions encouraged greater use of the summary judgment procedure, particularly in antitrust cases. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The district court below specifically instructed the parties to deal with this Court's summary judgment trilogy in their cross-motions for summary judgment, and the jobbers have brought forth nothing to indicate that the district court improperly applied those cases.

The jobbers advance a twisted interpretation of *Matsushita*. This Court held in *Matsushita* that summary judgment for defendant is appropriate where

the plaintiff's claim is "implausible—if the claim is one that simply makes no economic sense" and plaintiff is unable to come forward with "more persuasive evidence to support their claim than would otherwise be necessary." 475 U.S. at 587. The jobbers turn this holding on its head, and contend that summary judgment was inappropriate in this case because the suggested price sheets raise "[o]n the surface, at least, an economically plausible inference that the manufacturers do 'control,' to some extent, resale price levels." Pet. at 31. Under the jobbers' interpretation of *Matsushita*, the "surface" economic plausibility of a plaintiff's theory would mandate a trial, regardless of uncontroverted evidence to the contrary. That is an irrational and unworkable standard, based on an untenable interpretation of *Matsushita*.

Specifically addressing indirect purchaser doctrine claims, courts have emphasized that the " 'very nature of antitrust litigation would encourage summary disposition.' " *Windy City Circulating Co. v. Charles Levy Circulating Co.*, 550 F. Supp. 960, 963 (N.D. Ill. 1982) (granting motion) (*quoting Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979)); *H.A.B. Chemical Co. v. Eastman Kodak Co.*, 1981-1 Trade Cas. (CCH) ¶ 63,912 at 75,748 (C.D. Cal. 1980) (granting summary judgment and noting "the importance of summary judgment in appropriate antitrust cases"). The baker's dozen of courts that have now granted summary judgment to defendants on indirect purchaser claims demonstrate that this issue is particularly appropriate for summary disposition.

In short, the decisions below are fully consistent with indirect purchaser jurisprudence, the decisions

of this Court concerning summary judgment standards, and the jobbers' acknowledgement that there was no genuine dispute of material fact.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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